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In the Supreme Court
OF THE
United States

October Term, 1956

No. 103

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A.F.L.

BRIEF OF AMICI CURIAE

Bay Area Council of Bakery Operators,
California Metal Trades Association,
California Processors and Growers, Inc.,
General California Chapter, The Associated General Contractors of America, Inc.,
Distributors Association of Northern California,
Employers Council of Santa Clara Valley,
Federated Employers of San Francisco,
Foundry Employers Association,
Retail Furniture Council of San Francisco,
Sacramento Valley Associated Industries,
San Francisco Employers Council,
San Francisco Retailers Council,
San Joaquin County Industrial Association,
United Employers Incorporated.

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Pacific Maritime Association,
Retail Furniture Council of San Francisco,
Sacramento Valley Associated Industries,
San Francisco Employers Council,
San Francisco Retailers Council,
San Joaquin County Industrial Association,
United Employers Incorporated.

INTEREST OF AMICI CURIAE.

The written consent of the parties has been filed with the Clerk of this Court pursuant to Rule 42(2). This brief is being filed in support of Petitioner.

All of the Amici represented herein are employer associations engaged in multi-employer collective bargaining with labor organizations representing the employees of their members.

The employers represented by this brief believe that if the decision of the court below is upheld by this court it will mean not only the end of all multiple-employer bargaining but of substantially all genuine collective bargaining not only on the Pacific Coast but throughout the country.

This, of course, would be of no concern to this court if the statute prohibited lockouts in unmistakably clear language. Here, however, the court below itself concedes that there is no express prohibition against lockouts. In order to arrive at its conclusion that the lockout here involved is illegal the court below relies on general prohibitions against "interference" with and "coercion" of employees, and, in effect, decides that *any* resistance to a strike is an unfair labor practice because such resistance constitutes an interference with "protected concerted activities".

Collective bargaining could not survive under such a one-sided set of rules, and thus we say that the result of the decision below is contrary to the whole purpose and intent of the Act.

This can readily be demonstrated. Unions such as the Longshoremen's, the Sailors', the Teamsters', and

various Metal Trades Unions have contracts covering the entire Pacific Coast. To rule that such a union may bargain on a multi-employer basis and may then strike against the members of an employer group one at a time but that the other employers may not shut down in support of the struck employer means the end of all such employer associations. This is for the reason that the very basis of their existence has been destroyed.

If the employers are thus scattered to the winds the bargaining resulting from pitting an individual employer against a union of this size would be as unrealistic as the bargaining between a large and powerful employer and an individual employee. With all the bargaining and economic strength on one side and with virtually no power to resist on the other the result would be "runaway" increases in labor costs with rival labor leaders being forced to attempt to outdo one another. If left to run its course this would be very bad for the welfare of the country and contrary to the declared policy of the statute to encourage the practice and procedure of collective bargaining "by restoring equality of bargaining power between employers and employees." (LMRA 1947 Sec. 1.)

The only alternative to the inflationary results of such disparity in strength between the large union and the individual employer would be to cut the union down to the size of the individual employer. This is exactly what was attempted prior to and during the enactment of the Taft-Hartley Act.

Representatives of some of the employer associations now appearing on this brief, being convinced that such a proposal was a disservice to collective bargaining, testified before Congress in opposition to such proposal and in favor of the continuation of multiple-employer bargaining as it had been practiced for many years on the Pacific Coast.[1]

They are now before this court reaffirming their beliefs that multiple employer bargaining is the appropriate manner in which to achieve the "equality of bargaining power between employers and employees" declared to be one of the objects of the 1947 revision of the statute rather than chopping up all unions, and further, that the right to shut down in support of a struck employer is indispensable to multiple-employer bargaining.

The court below frankly admits that there are no provisions of the statute specifically outlawing employer lockouts such as were involved here. To arrive at its conclusion that such lockouts were illegal the court was obliged to lump together and to treat alike both "economic" lockouts to resist wage increases and "unfair labor practice" lockouts to interfere with the rights of employees to organize and bargain collectively.

We quote the following passages from the opinion below as follows:

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[1]See references to Legislative History of Taft-Hartley Act in Appendix hereto, pp. i-iv.

"No provision of the LMRA of 1947 by its terms generally specifically prohibits or authorizes lockouts by employers."

* * * * * * *

"In addition, paragraph 7 of the Act guarantees employees the right to engage in 'concerted activities' for 'their mutual aid or protection;' and it has been held that the right to strike and to support a strike constitutes 'concerted activity' which is protected by the statute. Interference with this right by the employer constitutes an unfair labor practice under Section 8 (a) (1) of the Act, and *a lockout prompted by a purpose to defeat employee organization or otherwise protected concerted activities is violative of the Act.* Such a lockout would also violate Section 8 (a) (3) of the Act." (Emphasis supplied.)

On the theory that the lockout in this case was prompted by a purpose to defeat "otherwise protected concerted activities", namely, the well recognized and well understood "whipsawing" process of picking off employers one at a time, the court declared that the lockout by the members of the multi-employer bargaining group in support of a struck employer was an unfair labor practice.

It will be the purpose of this brief to demonstrate the fallacy of the reasoning of the court below. In doing so, however, we will not add to the burden of this court by repeating what has been so well said in the dissenting opinion below, in the opinions of the other circuit courts, and in the opinion of the Board below.

OUTLINE OF ARGUMENT.

It will be our purpose to demonstrate the following propositions:

1. The lockout is not *per se* illegal but is as legitimate as the strike. Both the strike and the lockout may be lawful or unlawful depending on their purpose or object. In this case a lockout in support of a struck member of a multi-employer bargaining group is for a legitimate purpose.

2. The lockout is recognized as a legitimate tactic in the statute. There would be no purpose in specifying a sixty-day cooling off period if the lockout were *per se* unlawful.

3. The term "lockout" is used in the statute in its common-law sense and is not limited to employer shutdowns to save themselves from business losses.

4. The lockout is recognized as a legitimate procedure by organized labor which has repeatedly agreed that in case of a deadlock or impasse in the process of collective bargaining either side is free to strike or lock out as the case may be. In such cases, of course, the parties used the term lockout in its common-law sense and not in the restricted sense suggested by the court below.

5. The lockout has been recognized as a legitimate and necessary adjunct of multi-employer bargaining by impartial public officials who have had many years of intimate acquaintance with

the day-to-day rough and tumble process of collective bargaining.

6. While it is true that Congress did not specifically endorse multi-employer bargaining, it did nevertheless intend to recognize and preserve multi-employer bargaining as it was then being practiced by refusing to amend the statute in ways which would weaken multi-employer bargaining and which would remove the protection of the law from a multi-employer bargaining unit.

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1. THE LOCKOUT IS NOT PER SE ILLEGAL BUT IS AS LEGITIMATE AS THE STRIKE, BOTH THE STRIKE AND THE LOCKOUT MAY BE LAWFUL OR UNLAWFUL DEPENDING ON THE PURPOSE OR OBJECT.

In considering the question whether the lockout constitutes an unfair labor practice it must constantly be borne in mind that the statute nowhere expressly forbids it. On the contrary the statute expressly recognizes that lockouts do occur in industrial disputes and inferentially recognizes that they are legal and legitimate by prescribing a waiting period before they take place which would, of course, be unnecessary were the lockout illegal.

The court below seeks to bolster its reasoning by the fact that nowhere does the statute expressly declare or preserve the right to lock out, whereas, on the other hand, it does expressly declare and preserve the right to strike. However the instances in which strikes themselves are unfair labo-

practices are too numerous to list here. A strike may or may not be legal according to its purpose and object. The same is true of the lockout.

The Ninth Circuit Court in the *Davis Furniture* case[2] was careful to make clear that it had not granted a blanket immunity or protection of all lockouts. We are here concerned only with a lockout in support of a struck member of a multi-employer bargaining group.

The legality of the lockout depends upon its purpose or object. If the object is to interfere with the rights of employees to organize or to bargain collectively, obviously the object is contrary to and forbidden by the statute. Where, however, the lockout occurs as a result of a deadlock or stalemate or impasse in collective bargaining over economic issues, such as higher wages, shorter hours, fringe benefits and the like, the lockout in support of a struck member under the circumstances of this case can only be declared unlawful on the theory that it is an interference with protected concerted activities. Such a conclusion could not be reached without also logically concluding that *any* resistance to a strike would also constitute an interference with "protected concerted activities".

This is indeed a *reductio ad absurdum*. If such were the law there would be no collective bargaining. In order to preserve the process of collective bargaining it must be declared that such is not the law.

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[2]205 F. 2d 355.

2. THE LOCKOUT IS RECOGNIZED AS A LEGITIMATE TACTIC IN THE STATUTE. THERE WOULD BE NO PURPOSE IN SPECIFYING A SIXTY-DAY COOLING OFF PERIOD IF THE LOCKOUT WERE PER SE UNLAWFUL.

The opinion of the Ninth Circuit Court in the *Davis Furniture* case[3] lists the many instances in legislative history where the terms "strike" and "lockout" are used in conjunction with one another and also where the terms "strike" and "lockout" appear in the statute together.

It is submitted that if the lockout were *per se* unlawful all of the references to lockouts in connection with the sixty-day cooling off period and with national emergency work stoppages would be superfluous and unnecessary.

The only way to give these statutory provisions a reasonable or sensible construction or interpretation is on the theory that Congress has *recognized* the lockout as a legitimate and permissible weapon to be employed in collective bargaining but has placed statutory limits upon its use.

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3. THE TERM "LOCKOUT" IS USED IN THE STATUTE IN ITS COMMON-LAW SENSE AND IS NOT LIMITED TO EMPLOYER SHUTDOWNS TO SAVE THEMSELVES FROM BUSINESS LOSSES.

Continuing the discussion from the previous subheading, it is likewise impossible to give the statute a reasonable or sensible interpretation if the term "lockout" is limited to the few cases which the court below has listed as permissible.

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[3]205 F. 2d 355.

To limit the cases where an employer may lock out to a situation where the employer is desirous of saving a few dollars of flavoring syrup from spoilage as in the *Duluth Bottling Association*[4] case, or where the employers do not wish to disappoint their customers whose automobiles they have received for repair as in the *Betts Cadillac Olds*[5] case, or because prospective work stoppages threaten to be of a recurrent nature so that it is difficult for the employer to plan production as in the *International Shoe*[6] case, is a forced, unnatural and unrealistic interpretation and application of the word "lockout". Yet these appear to be the *only cases* in which the court below would permit an employer to shut down because of concerted activities by his employees. There is not a word in the entire Legislative History to justify such interpretation. Certainly none was cited or referred to by the court below.

It is much more reasonable to suppose that the term "lockout" as used in the statute was employed in its well known and well understood common-law sense; that is to say, the sense in which it had been employed for many years prior to the enactment of the Taft-Hartley Act.

For example, the term "lockout" is defined as follows:

> "'A lockout is an employer's withholding of work from his employees in order to gain a con-

[4] 48 NLRB 1335, 12 LRRM 15.
[5] 93 NLRB 907, 27 LRRM 1504.
[6] 96 NLRB 268, 28 LRRM 1509.

cession from them. It is the employer's counterpart of a strike.'

"Restatement of Torts, Sec. 788, Comment subdiv. (a)"

"'* * * A lockout is a temporary withholding of work from a group of employees by an employer (or group of employers) in order to coerce them into accepting the employer's terms.'

"Bulletin U.S. Dept. of Labor, Bureau of Labor Statistics No. 651."

Perhaps the classic legal definition of lockout is to be found in *Iron Molders Union v. Allis-Chalmers,* 166 Fed. 45 at page 52, where the concurring opinion of Judge Grosscup reads in part as follows:

"A strike is a cessation of work by employees in an effort to get for the employees more desirable terms. A lockout is a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms."

This definition is quoted with approval in

Jeffry-Dewitt Insulator Co. v. N.L.R.B., 91 Fed. 2d 134 at 137.

In *Magner v. Kinney,* 141 Nebraska 122, 2 N.W. 689, the court also repeats the definition of strike and lockout from *Iron Molders Union v. Allis-Chalmers* and adds the following:

"We understand in labor disputes, to 'lock out' is 'to withhold employment from (a body of employees) as a means of bringing them to accept the employer's terms.'"

Citing *Webster's New International Dictionary Second Edition* 1450.

In addition to numerous judicial definitions, the lay or popular definitions of lockouts are equally clear, concise and consistent. For example, the term "lockout" is defined as follows:

"*Lockout*—The discontinuance of operation in one or more plants by employers acting individually or collectively in order to resist labor demands or to enforce the acceptance of conditions of labor by employees. Refusal to continue to give employment to a group of workmen."

Labor Terminology; Bureau of Business Research, Harvard University, pp. 50, 51, 74 and 85; also 79.

"*Lockout*—Withholding of work from employees by an employer (or a group of employers) in order to coerce them into accepting the employer's terms."

The Management Almanac 1946.
National Industrial Conference Board, pp. 323, 324, 326 and 327.

"*Lockout*—Closing down of a business as a form of economic pressure by an employer to enforce acceptance of his terms."

Primer of Industrial Relations, The Bureau of National Affairs, Inc., pp. 58, 61 and 62.

4. THE LOCKOUT IS RECOGNIZED AS A LEGITIMATE PROCEDURE BY ORGANIZED LABOR WHICH HAS REPEATEDLY AGREED THAT IN CASE OF A DEADLOCK OR IMPASSE IN THE PROCESS OF COLLECTIVE BARGAINING EITHER SIDE IS FREE TO STRIKE OR LOCK OUT AS THE CASE MAY BE. IN SUCH CASES, OF COURSE, THE PARTIES USED THE TERM LOCKOUT IN ITS COMMON-LAW SENSE AND NOT IN THE RESTRICTED SENSE SUGGESTED BY THE COURT BELOW.

The distinction between an attempt to resist an economic strike and an attempt to break up a union or to interfere with employees' rights to engage in collective bargaining is so clear as to be unmistakable. Organized labor has no difficulty in seeing this distinction. While organized labor would never accede to employer efforts to break up unions or to interfere with collective bargaining, it freely concedes the right of employers to lock out on economic issues. A few examples may be worthwhile.

In the largest and one of the most important contracts in the United States, to wit, the contract affecting the basic steel industry, appears the following language:

> "If the parties shall not agree with respect to insurance and pensions by midnight of June 30, 1959, either party may thereafter resort to strike or lockout, as the case may be, in support of its position in respect to such matter as well as any other matter in dispute."

Similar language appeared in earlier contracts of the parties.

Examples of similar language employed in *multiple-employer* contracts can be cited almost without num-

ber. For example, the agreement between Warehouse Union Locals Nos. 6 and 17 affiliated with the Longshoremen's and Warehousemen's Union and Distributors Association of Northern California contains the following language:

> "In the further event that this agreement is reopened as hereinabove provided (in 1956 or 1957) and the parties are unable to reach an agreement, the Union shall have the right to strike and the Association the right to lock out on the matter or matters which were properly opened in accordance with this agreement * * *."

Another example may be found in the multiple-employer contract between Department Store Employees Union Local No. 1100, Retail Clerks International Association and San Francisco Retailers Council, reading in part as follows:

> "In the event the contract is so re-opened for negotiations on any or all of the issues above enumerated and the parties are unable to reach an agreement thereon then the Union shall have the right to strike and the employers the right to lock out on the issues then subject to re-opening and all other provisions of this contract shall remain in effect."

While the Local Union which instigated the proceeding below is an affiliate of the Teamsters International, it is noteworthy that other Teamster Locals consider the lockout to be a legitimate device in multiple-employer collective bargaining. For example, we reproduce the language of Section 28 of the collective bargaining agreement covering the produce

markets in the San Francisco Bay area, this being a multi-employer bargaining contract with Commission Market Drivers, Salesmen & Helpers Local Union No. 280, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America:

> "(b) This agreement may be opened for negotiation on vacations (Section 9) on February 1, 1958, by the giving of the notice as set forth hereafter. Wages, as set forth in Section 3, may only be opened for negotiation if the Consumer Price Index has risen in an amount which would permit a wage adjustment of 50¢ per day (rounded off) or more and to negotiate such permissible amount, upon either party giving written notice of its desire to open not more than ninety (90) nor less than sixty (60) days prior to February 1, 1958. If no such notice is given, there shall be no opening until February 1, 1959. In the event this agreement is opened for the negotiation of vacations or wage rates, and the parties are unable to reach an agreement, the Union shall have the right to strike and the Employer shall have the right to lockout."

We also submit language appearing in a collective bargaining agreement between United Parcel Service, Portland, Oregon, and General Teamsters Auto Truck Drivers and Helpers Local Union No. 162 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America:

> "This agreement shall be effective from the 1st day of August, 1956, and from year to year thereafter unless either party to this agreement

serves notice as provided for herein. If either party wishes to modify or terminate this agreement, it shall serve notice of such intention upon the other party sixty days prior to the expiration or subsequent anniversary date. If any such notice to modify or terminate is served the Union shall be free to strike or the employers to lockout after the expiration date or subsequent anniversary date. All future agreements whether new or modifications of this agreement shall be retroactive to the expiration date or subsequent anniversary date of the previous agreement, if reached amicably and without resort to work stoppage, strike or lockout on the part of either party."

The same language also appears in a contract between Olds, Wortman & King and Dohrmann Commercial Company and Warehousemen's Union Local No. 206 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America of Portland, Oregon.

When organized labor itself agrees that the lockout is a permissible and legitimate tactic in an economic strike (as distinguished from an attempt to prevent unionization or to prevent collective bargaining), it is difficult to see how the court below concluded that such a lockout constituted an "interference" with collective activities and "discouraged" union membership.

We wish to emphasize once more that as the term was used in the agreements above quoted it was used in its well understood common-law sense and not in

the restricted sense which the court below has indicated is the only one in which the lockout may be considered legal.

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5. THE LOCKOUT HAS BEEN RECOGNIZED AS A LEGITIMATE AND NECESSARY ADJUNCT OF MULTI-EMPLOYER BARGAINING BY IMPARTIAL PUBLIC OFFICIALS WHO HAVE HAD MANY YEARS OF INTIMATE ACQUAINTANCE WITH THE DAY-TO-DAY ROUGH AND TUMBLE PROCESS OF COLLECTIVE BARGAINING.

We have taken the liberty of setting forth below statements of two distinguished public servants. We would not do so in ordinary cases of statutory construction or interpretation but believe that it is appropriate and may be helpful to the court in this case in reviewing the decision of the court below based solely on that court's concept of what constitutes an unlawful "interference" with "protected concerted activities".

We have selected statements from the former chairman of the National War Labor Board and the former chairman of the National Labor Relations Board and of the National Mediation Board. Both of these distinguished gentlemen have had "ringside seats" in some of the most important collective bargaining in the industrial history of this country. Both are sympathetic to the aims and objectives of organized labor, but, above all, are devoted to the common good and the public welfare. Both believe profoundly that if collective bargaining is to be preserved it should not be by cutting down the size or strength of labor organizations but by encouraging employer organiza-

tions to match the economic strength of the unions with which they bargain.

When the campaign to outlaw industry-wide bargaining was at its height in 1947 the Institute of Industrial Relations of the University of California held a conference to consider Industrial Disputes and the Public Interest. At this conference, in March 1947, William M. Leiserson, formerly a member of the National Labor Relations Board and chairman of the National Mediation Board, read a paper on "The Role of Government in Industrial Relations" in which he said, among other things:

> "The National Labor Relations Act has freed the forces that make for union organization and collective bargaining, and thereby it has contributed greatly to the private industrial law-making through which government control is made practical and effective. Its basic provisions must therefore be retained, and government policy grounded in them. But the Act has also developed some abuses which obstruct rather than promote agreement between labor and management. It is folly, therefore, to hold that no changes in it are necessary. *But if the collective bargaining policy is to achieve its purposes, any amendments made must strengthen such bargaining, not weaken it. The public interest requires collective bargaining to be strengthened if it wants to avoid dictation either by management or by government officials.* Private interests would be furthered if the collective bargaining policy were weakened.
>
> "To strengthen this policy, therefore, an amendment is needed that will require unions to bargain collectively, as well as employers. On

the assumption that unions exist primarily for bargaining purposes, — which is true enough — the obligation was imposed only on employers. But this stimulated a take-it-or-leave-it attitude on the part of not a few unions, and the omission needs to be corrected.

"Similarly the Act does not make it an unfair labor practice for a union to discriminate against employers who form or join employers' associations. *Neither does it encourage organization among employers as it does among working people. There is no good reason why the Act should not treat management and labor alike in these respects, and an amendment to this effect would strengthen the bargaining policy.* To make sure of such equal treatment, some countries define labor unions as organizations either of employers or workers for collective bargaining purposes.

"As our unions have grown in membership and power, some of them have tipped the scales with more bargaining strength than the employers. This tends to make the unions headstrong, conciliation and mutual agreement more difficult. The collective bargaining policy, however, is predicated on equal bargaining power. *Many proposed amendments would weaken unions as a means of equalization. This would be a backward step.* It would lessen responsibility, and stimulate warfare rather than industrial law making. *The constructive way is to encourage employers to organize to match the strength of the unions.*" (Emphasis supplied.)

Organizing to "match the strength of the unions" certainly includes organizing to lock out in support of a struck member of the group.

A year later Dr. George W. Taylor, who, at various times has served his country, as chairman of the National War Labor Board, Secretary to the President's Labor-Management Conference, and Chairman of the Advisory Board of the Office of War Mobilization and Reconversion, delivered a paper at the University of California Institute entitled, "Can Wages Be Left to Collective Bargaining?", in which he declared:

> "The government was called upon, in 1935 and again in 1947, to adjust the economic power possessed by management and by organized labor so that *'an equality of bargaining power'* would obtain — so that neither would be able arbitrarily to impose its will on the other."

In discussing multi-employer bargaining he said:

> "There are other types of situations in which management derives advantages from multi-employer bargaining for a fair wage per se. In times of active business and shortage of manpower, disorderly upward spirals of wages can be minimized and labor turnover can be decreased.
>
> "Only through multi-employer bargaining, moreover, can whipsawing of small and medium-sized concerns, by the union be forestalled. *Setting a fair wage per se by group bargaining sometimes provides the only means by which a relatively small employer can secure any voice at all in wage determination, especially if he deals with a union powerful enough unilaterally to impose a multi-employer wage policy.*
>
> *"There are arguments for and against multi-employer bargaining. Acceptance of the 'anti'*

arguments, however, requires a conclusion that wages cannot be stabilized through collective bargaining despite the obvious need for just that kind of wage determination which was most apparent in the early 1930's." (Emphasis supplied.)

Without the right to lock out in support of a struck employer there *is no way* to forestall the whipsawing of small and medium sized concerns. The lockout is the only way for the small employer to secure any voice in the wage determination.

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6. WHILE IT IS TRUE THAT CONGRESS DID NOT SPECIFICALLY ENDORSE MULTI-EMPLOYER BARGAINING, IT DID NEVERTHELESS INTEND TO RECOGNIZE AND PRESERVE MULTI-EMPLOYER BARGAINING AS IT WAS THEN BEING PRACTICED BY REFUSING TO AMEND THE STATUTE IN WAYS WHICH WOULD WEAKEN MULTI-EMPLOYER BARGAINING AND WHICH WOULD REMOVE THE PROTECTION OF THE LAW FROM A MULTI-EMPLOYER BARGAINING UNIT.

Referring to the question whether or not Congress expressly sanctioned multiple-employer bargaining, the court below in a footnote in its opinion makes a brief reference to the legislative history of the attempt to outlaw multi-employer bargaining but concludes that multi-employer bargaining has never received the express sanction of Congress.

An examination of the legislative history referred to by the court reveals that the bill as originally enacted by the House absolutely prohibited multi-employer bargaining. This measure was abandoned as it had no prospect of success. In its place a sub-

stitute measure was offered on the floor of the Senate which did two things:

First, it provided that a labor organization could not be certified as the representative of two or more employers unless the employees were all located in the "same metropolitan area" and did not exceed one hundred in number.

Secondly, it restrained national or international labor organizations from dominating or interfering with the independence or autonomy of their local unions. (See footnote 13 opinion below.)

Despite the repeated protestations of the sponsors of this measure that if enacted it would not interfere with multi-employer bargaining as it was *voluntarily* carried on by employers and labor organizations, the measure was defeated.

One of the prime considerations in defeating this measure was that it *removed the protection of a Board certification from the multi-employer unit.* Again and again the various legislators expressed reluctance to *disturb the existing situation.* For example, Senator Lodge declared in part as follows:

> "I want to correct the evils that have developed and I want to help the small rural communities, *but I do not see why, in order to correct the evils that haven arisen and in order to help the small rural communities, we have to undo whatever good has been done by the uniformity in wage making and why we have to interfere with the non-rural communities where the general interest has been served by people being able to get together on wage matters.* It seems to me that the

job of statesmanship is to correct one evil without causing another evil." (Emphasis supplied.)

Senator Revercomb stated it succinctly: "Why *disturb a situation which is so satisfactory?*" (Legislative History pp. 1221 and 1222.)

The deliberate act of Congress in refusing to place multi-employer bargaining on an "extra legal" status by removing the protection of a Board certification and in refusing to enact even the relatively mild limitations which were proposed most certainly indicated that Congress intended that multi-employer bargaining should continue as it had been practiced.

CONCLUSION.

The National Labor Relations Board in its considered judgment concluded that the strike against one member of the multi-employer bargaining group "necessarily carried with it the implicit threat of future strike action against any or all of the other members of the multi-employer bargaining unit." This conclusion was accepted by the majority as well as the dissenting member of the court below.

Under the circumstances of the above case the Board in its considered judgment concluded that the action of the members of the multi-employer bargaining group in locking out in support of a struck member was not an unlawful interference with protected concerted activities. With reference to the undertaking of the court below to reverse this decision of the

Board we can do no better than to quote from the language of this court in *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177 at 194, as follows:

> "* * * But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric *process of administration.*" * * * (Emphasis supplied.)

As was said in the dissenting opinion below:

> "The Act is not a detailed blueprint but a general guide; and it is the function of the Board to adjust the conflicting interests of employers and employees. * * *
>
> "* * * I do not think it is properly inferable that Congress by its inaction meant to leave the question of multi-employer bargaining to be dealt with in future legislation. On the contrary, considering the long history of multi-employer units it seems more reasonable that Congress intended that the Board should continue its established administrative practice of certifying multi-employer units and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future."

There being no express statutory prohibition against lockouts by employers in support of a struck member of their bargaining group under the circumstances of

this case nor anything in the legislative history to indicate such intent on the part of Congress, it was error for the court below to reverse the decision of the Board.

Dated, San Francisco, California,
November 14, 1956.

Respectfully submitted,

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Sacramento Valley Associated Industries,
San Francisco Employers Council,
San Francisco Retailers Council,
San Joaquin County Industrial Association,
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(Appendix Follows.)

Legislative History of LMRA 1949—pp. 468 & 469
Senate Minority Report No. 105, Pt. 2 on S. 1126

"We should like to indicate what would be the effect of a ban on industry-wide bargaining on present-day industrial relations.

"Any attempt to ban actions by employers to form voluntary associations for the purpose of collective bargaining would deny this group the protection accorded employee organizations. In many trades and industries, employers have joined together to bargain with unions representing their employees. In such industries as longshoring and building construction—where workers change employers from day to day or week to week—bargaining through employers' associations is the only practical method for establishing uniform wages and working conditions and eliminating cutthroat competition. Almon E. Roth, President of the National Federation of American Shipping, in a statement before the committee, warned that a ban against industry-wide bargaining would result in a 'diversity of wage rates and working conditions among ships operated from the same coast, plying between the same ports, tying at the same docks, and employing, in turn, the same men:

'Such a condition leads to the playing off of one steamship company against another by the unions, to extreme labor unrest, and eventually to the disruption of steamship operation.'

"Many employers prefer industry-wide or association bargaining. Mr. Vincent P. Ahearn, executive secretary of the National Sand and Gravel Association, testified before the committee:

"'Some employers believe that if they could not bargain on an industry-wide basis, unions could simply isolate one employer after another and force capitulation to their demands.'

"This would create a situation where the weakest member of an industry would set the standard for the others.

"Because numerous employers are covered by a single collective-bargaining agreement, less time is lost in the bargaining process. Settlements are made simultaneously for these employers rather than on an individual employer-by-employer basis. Industrial peace is achieved in one step, rather than over a prolonged period of time. Bargaining with hundreds of individual firms for the same things is both wasteful and unfair to both sides.

"Many small employers lack the skill in bargaining and research facilities available to unions. A ban on associations of employees combining for the purpose of pooling their knowledge and resources in collective-bargaining negotiations would impair the bargaining power of employers.

"Industry-wide agreement on wages protects wage standards from being undercut by lower-wage areas and lower-wage employers. By the same token, industry-wide bargaining may save individual employ-

ers from being singled out as wage leaders in their respective industries. A ban on such agreements would result in separate agreements with individual locals. Many firms control or own subsidiary plants in districts outside an immediate geographic area. Such firms would have to negotiate agreements with numerous local unions in widely scattered localities—a task that would unavoidably become snarled up in wage differentials and eventually would revive the old cutthroat competition and the law of the jungle between company and company, between area and area."

Legislative History of LMRA 1947—pp. 971 & 2
Congressional Record, Senate—March 10, 1947

"1904

"Mr. Morse. Mr. President, as the debate on Senate bill 133 progresses I think that later in this session we shall want to refer repeatedly to the information contained in this excellent bulletin on Collective Bargaining With Associations and Groups of Employers, because I think it is clear from the data presented in the bulletin that passage of Senate bill 133 would be disruptive of the labor relations in a large number of industries, involving a great many thousands of employees.

"The testimony that was presented to us by some employer representatives at our committee hearings, Mr. President, shows that there are many employers who are completely sold on the desirability of group-employer collective bargaining with labor insofar as the particular problems of their industry are con-

cerned. Take, for example, the maritime industry, with which I have had some years of experience as the Pacific-coast arbitrator. I am satisfied that the formation of the West Coast Ship Owners Association for collective-bargaining problems brought remarkable labor-relations stability to the industry during

"1905

the years when I was arbitrator. I do not mean we did not have a great deal of trouble, for we did; but I do mean that the *united actions of the shipowners* in the great cases that we tried were a great boon to them. Prior to the formation of their employers' association the union strategy—and it is not a bad one as far as effectiveness is concerned—was to pick off shipowners one at a time, starting with the ones the union felt were in the weakest bargaining position. However, after the association was formed the officers of that association, principally through Mr. Frank Foisie, the president, and Mr. Gregory Harrison, its general counsel, were in a position to represent and speak for all the shipowners on the west coast."